STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

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| IN RE:<br>MR. AND MRS. GREGORY SWECKER,<br>Complainants,<br>vs.<br>MIDLAND POWER COOPERATIVE,<br>Respondent. | DOCKET NO. FCU-99-3<br>(C-99-76) |

**ORDER AFFIRMING PROPOSED DECISION AND ORDER AS MODIFIED BY ORDER ISSUED MAY 18, 2000**

(Issued August 25, 2000)

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## INTRODUCTION

This matter involves a customer of a rural electric cooperative who installed a wind generator and disagrees with the terms and conditions of the cooperative's cogeneration tariff. The case also involves a disconnection issue that arose when the customer discontinued payment for regular electric service during this dispute. The administrative law judge (ALJ) issued a proposed decision and order finding that the cooperative's cogeneration tariff is unreasonably discriminatory and that the customer should be connected pursuant to the cooperative's regular three-phase service tariff. The ALJ subsequently ruled that the customer's regular service was properly disconnected.

The cooperative appealed to the Board from the ruling, challenging the Board's jurisdiction and the merits of the ALJ's decision regarding the cogeneration tariff. The customer also appealed, challenging the application of the cooperative's disconnection and reconnection charges and the ruling on disconnection of the customer's regular service. Finally, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) appealed the ALJ's proposed ruling regarding application of other alternative energy statutes to cooperatives.

## FACTUAL BACKGROUND

The ALJ's "Proposed Decision And Order" (PDO), issued March 28, 2000, includes a detailed description of the events leading to this complaint. See PDO at 12-114. No purpose would be served by repeating that entire description in this order. Only the most relevant events will be summarized in this order.

In 1998, Mr. and Mrs. Gregory Swecker (Sweckers) installed a 65 kW wind generator on their farm, located in Greene County near Dana, Iowa. (Transcript pages 27 and 29, hereinafter "Tr. 27, 29.") The Sweckers then requested interconnection with Midland Power Cooperative (Midland), their regular electric service provider. (Id.) Midland is a distribution rural electric cooperative with about 6,800 members. (Tr. 504-05.) The Sweckers' regular service is single-phase, but the wind turbine requires a larger, three-phase connection. (Tr. 68, 116, 522, 770.) The Sweckers also need three-phase service for some shop equipment they installed at about the same time. (Tr. 40, 181.)

Midland learned that the Sweckers intended to connect a wind turbine generator and offered to install three-phase service pursuant to Midland's Tariff 26.16, which is intended for customers with cogeneration with a capacity of 100 kW or less. (Tr. 220.) Tariff 26.16 would require the Sweckers pay a one-time charge of $5,712.17 for interconnection costs, a monthly service charge of $86, a coincidental demand charge of $15.90 per kW/month, and an energy rate of $0.03 per kWh. (PDO at 14-15.) Tariff 26.16 would also require that the Sweckers sign a two-year service contract and maintain a $1,000,000 insurance policy, among other special provisions. (Tr. 518-19, 529.)

If the Sweckers were permitted to order service under Midland's regular three-phase service tariff, Tariff 26.11, they would pay only $2,500 for interconnection costs, a monthly service charge of $36, no coincidental demand charge, and a declining block energy rate that starts at $0.12 per kWh and falls to $0.056 per kWh. (Tr. 76, 220, 232.)

The Sweckers protested Midland's proposal, arguing they should be connected under the regular three-phase tariff, Tariff 26.11, rather than the cogeneration tariff. The controversy continued to develop and the Sweckers ultimately suspended payment for their regular household service, apparently claiming a right of offset. (PDO at 17-19.) When Midland initiated disconnection proceedings, the Sweckers delivered to Midland a single check for the back-due electric bills plus $2,500 for a three-phase connection under Tariff 26.11. (Id.) Midland refused to accept the check because Midland believed that doing so might create a contract to install three-phase service at the lower charge. (Id.) The Sweckers were subsequently disconnected, then paid their past-due bills and were reconnected to regular household service. (PDO at 21.)

During this time period, the Sweckers filed a complaint with the Board. (Id.) It was originally treated as an informal complaint (C-99-76), then became a formal complaint (Docket No. FCU-99-3) that was assigned to the ALJ for hearing and resolution. See "Order Granting Request For Formal Complaint Proceedings And Assigning To Presiding Officer," issued June 23, 1999.

During the formal complaint proceedings, another Midland cogenerator, Mr. Bob Welch, intervened. (PDO at 3.) Mr. Welch also has a 65 kW wind turbine, which he installed at the site of his 30-unit motel in 1996. (Tr. 163, 304.) Mr. Welch's turbine is the only cogeneration operating on Midland's system. (Tr. 86, 506.) He is billed pursuant to Midland's Tariff 26.18, which is applied to cogeneration customers located on that part of Midland's system served by Corn Belt Power Cooperative. (Tariff 26.16, which Midland seeks to apply to the

Sweckers, applies to cogeneration customers on that part of Midland's system served by Central Iowa Power Cooperative. The two cogeneration tariffs are substantially similar.) (Tr. 585.)

Mr. Welch's turbine was installed and connected in October of 1996, at which time he was transferred from the regular three-phase service tariff (26.12, for a customer on the Corn Belt Power Cooperative system) to the cogeneration tariff, with a higher monthly service charge, a higher coincidental demand charge (compared to the non-coincidental demand charge he was paying under Tariff 26.11), and a lower energy rate. (PDO at 24.) Originally, he was told he would have to pay $2,800 for a special meter, but that cost was reduced and then eliminated by Midland due to an alleged ambiguity in the cogeneration tariff (which was subsequently revised). (Tr. 305, 726-27.) Overall, it appears Mr. Welch's total annual electric bill may have been reduced when he began cogenerating, although Mr. Welch does not agree and other changes in his usage patterns make it difficult to be certain. (PDO at 25-27.)

Intervenors in this matter include the Iowa Association of Electric Cooperatives (IAEC), Central Iowa Power Cooperative (CIPCO), Iowa Citizens Action Network (ICAN), and Mr. Welch. Consumer Advocate also participated, pursuant to Iowa Code § 475A.2.

Hearing was held in this docket on November 23 and 24, 1999. Extensive evidence was presented at hearing and Midland's electric tariff was officially noticed pursuant to Iowa Code § 17A.14. (Tr. 8.) Additional facts will be discussed below, as necessary.

## SUMMARY OF THE PROPOSED DECISION AND ORDER

On March 28, 2000, the ALJ issued a proposed decision and order, finding:

1. Iowa Code § 476.21 applies to electric cooperatives, through the express language of § 476.1A, and prohibits cooperatives from unreasonably discriminating against cogeneration customers. (Conclusion of Law No. 3, PDO at 142-43.)

2. The rates and rate structures specified in Midland's Tariff 26.16 and 26.18 unreasonably discriminate against small cogeneration customers because they treat customers differently based solely on their use of renewable energy and without any neutral, cost-based studies to support that result. (Conclusion of Law No. 16, PDO at 146.) The requirement to pay for a meter capable of measuring coincident demand is also unreasonably discriminatory and violates § 476.21. The remaining interconnection requirements in Tariffs 26.16 and 26.18 are not unreasonably discriminatory and do not violate the statute.

Midland argues the differences between the cogeneration tariff and the regular three-phase tariff are cost-based because the rates were derived from the same cost-of-service study. However, the ALJ found this was not the end of the analysis. The cost-of-service study relied upon by Midland did not include any cogeneration customers or any cogeneration-specific data, so the ALJ found it provides no basis for treating cogeneration customers differently. Instead, the ALJ found that Midland merely assumed cogenerators would be different from other three-phase customers and that, as a result, Midland would not recover its cost to serve a cogenerating customer if the regular tariff applied. (Finding of Fact Nos.

12-13, PDO at 136-27.) The ALJ found Midland had no data to support its assumption; in fact, because Midland does not demand meter all three-phase customers, Midland had no data on regular three-phase customers to show whether the regular tariff treats customers fairly. (Finding of Fact Nos. 14-19, PDO at 137-39.)

The cost-of-service study was used by Midland to design rates for the three-phase customers as a class. (Id.) In that class, Tariff 26.11 (regular service) rates are designed such that some customers will pay more than the actual cost to serve those individual customers, while other customers will pay less than their individual cost to serve, but the class as a whole will cover the cost to serve the class. The cooperative bears some risk of under-recovery, but also benefits from a chance of over-recovery from the class as a whole.

Tariff 26.16, the cogeneration tariff, reflects a different policy because it is designed for individual customer cost recovery. (Id.) By putting much more of the cost of service into the monthly service charge and the demand charge, Midland effectively ensures full cost recovery from each customer, without class averaging. This shifts most of the risks associated with increased or decreased usage to the customers. The net effect is that the cogeneration tariff may be more expensive for smaller cogenerators but may be somewhat less expensive for a large cogenerator.

The ALJ found there is no evidence in the record to support this different approach to rate design because there is nothing to show that cogeneration customers, as a class, require different treatment from other three-phase customers. (Finding of Fact Nos. 19-21, PDO at 138-39.) Thus, the ALJ found the

cogeneration tariff, Tariff 26.16, to be unreasonably discriminatory in two respects: first, Midland had no data to support the decision to treat cogenerators separately from other three-phase customers, and second, Midland had no data to support cost recovery by individual customer, rather than by class. (Conclusion of Law No. 16, PDO at 146.)

3. The ALJ found that some tariff differences between cogenerators and other three-phase customers are justified. Because a cogenerator is selling energy to the cooperative, the ALJ found it reasonable to require that the cogenerator:

(a) Sign a contract addressing those differences,

(b) Install a disconnect switch for safety purposes,

(c) Pay the excess costs associated with the special meter (not including demand measurement capability), and

(d) Pay the excess costs of the interconnection. (Conclusion of Law No. 16, PDO at 146.)

4. With respect to the disconnection of the Sweckers' regular household service, the ALJ originally found that the record contained no evidence that Midland gave the Sweckers all of the written and oral notices required under Board rules and Midland's tariff. (Conclusion of Law No. 19, PDO at 147.) However, after the record was reopened and additional evidence received, the ALJ issued an order amending the proposed decision and order and finding that Midland sent all of the required notices and properly disconnected the Sweckers for nonpayment. ("Order Amending Proposed Decision and Order," issued May 18, 2000)

The overall result of the proposed decision and order is as follows: First, Tariff 26.16 is rejected as unlawful because it is unreasonably discriminatory and violates Iowa Code § 476.21. This leaves the Sweckers to take service under the regular three-phase tariff, Tariff 26.11. (Ordering Clause No. 1, PDO 147.)

Second, Midland may charge the Sweckers for the excess interconnection and metering costs associated with the sale of energy from the Sweckers to Midland, but not for that portion of the specialized meter used to measure coincident demand. (Ordering Clause Nos. 2-4, PDO at 147-48.)

Third, Midland may require that the Sweckers install a disconnect switch, maintain insurance, pay the same 40 percent markup on equipment that other customers are required to pay, and sign a two-year contract for service. (Ordering Clause Nos. 5 and 6, PDO at 148.)

Fourth, the Sweckers must pay the standard reconnection fee to Midland (for reconnecting their household service after it was disconnected). (Order amending proposed decision and order, Ordering Clause No. 1, at page 8.)

Finally, Midland may continue to serve Mr. Welch, the other cogenerator, pursuant to Tariff 26.18, but only if Mr. Welch agrees. (Ordering Clause No. 9, PDO at 148.)

Midland, IAEC and CIPCO, the Sweckers, and Consumer Advocate have all filed or joined in notices of appeal, seeking Board review of various aspects of the proposed decision and order. The issues before the Board are as follows:

Midland, IAEC, and CIPCO issues

1. Whether the Board has jurisdiction to address a complaint of discrimination against a cooperative that is not subject to the rate jurisdiction of the Board.

2. Whether the administrative law judge erred in finding the cogeneration tariff rates of Midland were discriminatory.

Sweckers' issues

3. The proposed decision and order should have held that Midland and other non-rate-regulated utilities must provide net billing to their cogenerating customers.

4. The proposed decision and order requires the Sweckers to pay a portion of the cost of the special meter required for their service, but did not specify how the cost of the special meter should be apportioned between the Sweckers and Midland.

5. The proposed decision and order allowed Midland to charge a 40 percent markup on the cost of the special meter, which the Sweckers believe to be discriminatory because regular three-phase customers are not charged for equipment related to their electrical service.

6. The proposed decision did not require Midland to purchase energy and capacity from cogenerators at avoided cost, as required by 18 C.F.R. §§ 292.303 and 292.304.

7. Whether the order amending the proposed decision and order correctly addressed the Sweckers rights and remedies to avoid disconnection pursuant to 199 IAC 20.4(16)"c" and 199 IAC 20.4(15)"h"(6).

Consumer Advocate issue

8. Whether Iowa electric cooperative associations are subject to the requirements of Iowa Code §§ 476.41-.45 and, therefore, subject to the Board's rules implementing or adopted pursuant to those statutes, including the Board's net billing rule.

Each of these issues will be considered separately, in the order listed.

**Issue 1. Does the Board have jurisdiction to address a complaint of discrimination against a cooperative that is not subject to the rate jurisdiction of the Board? (Raised by IAEC and CIPCO.)**

The proposed decision and order. The ALJ found that Midland is not subject to the Board's rate regulation pursuant to Iowa Code § 476.1A (1999), but that Midland is subject to the anti-discrimination provisions of § 476.21. (PDO at 114.) The ALJ therefore found that the Board has jurisdiction to review what Midland has done in order to determine whether Midland's tariffs unreasonably discriminate against cogenerators like the Sweckers. (PDO at 115.) If that discrimination exists, the Board does not have jurisdiction to set new rates for Midland, but the Board can reject the illegal tariff and permit the Sweckers to connect pursuant to the next applicable tariff. At the same time, the Board can define the discrimination in terms that will permit Midland to adopt better, non-discriminatory tariffs in the future.

IAEC and CIPCO's appeal. IAEC and CIPCO raised this jurisdictional issue in a partial motion to dismiss filed on September 16, 1999, which was denied by the ALJ on October 8, 1999. IAEC and CIPCO filed an interlocutory appeal to the Board on October 20, 1999, which will be addressed as a part of this order.

IAEC and CIPCO argue the Board has no authority with respect to Midland's rates for service to the Sweckers because Midland is an electric cooperative association. The Board's authority with respect to cooperatives is set out in Iowa Code § 476.1A, which provides that electric cooperatives, "are not subject to the rate regulation authority of the board." IAEC and CIPCO argue that this direct prohibition cannot be avoided by indirect regulation, citing Nishnabotna Valley Rural Electric Cooperative v. Iowa Power and Light Co., 161 N.W.2d 348, 354 (Iowa 1968). IAEC and CIPCO assert that this complaint docket is an attempt to regulate indirectly what the Board cannot regulate directly.

The proposed decision and order says that the focus is not on setting rates for Midland, but on determining whether Midland's existing rates are discriminatory. (PDO at 115.) IAEC and CIPCO argue this is effectively the same as setting rates, since the proposed decision and order establishes ratemaking methodologies that Midland must follow in setting its cogeneration rates in the future. Further, they argue that the evaluation of possible discrimination is based on an analysis of cost studies and cost recovery, which is too closely related to rate making to be acceptable.

IAEC and CIPCO admit that Iowa Code § 476.1A clearly states that § 476.21 applies to cooperatives, but they argue this does not give the Board authority to

enforce the non-discrimination provisions of § 476.21. Instead, they believe the Sweckers should have filed an action in state district court.

The Sweckers' response. The Sweckers argue that the ALJ is correct and that this proceeding does not amount to regulating the rates of Midland because the ALJ is not telling Midland what rates to charge. Instead, the ALJ simply found that Midland's existing cogeneration rates are unreasonably discriminatory and in violation of § 476.21.

Consumer Advocate. Iowa Code § 476.1A, which limits the Board's jurisdiction over cooperatives, specifically provides that various code sections, including § 476.21, "to the extent applicable, apply to such utilities." Thus, argues Consumer Advocate, the interpretation offered by IAEC and CIPCO (that the exception of § 476.1A should override the provisions of § 476.21) is backwards. In Consumer Advocate's view, § 476.21 creates a specific exception to the general limitation on Board authority that is set forth in § 476.1A.

Consumer Advocate also argues that the Nishnabotna decision is distinguishable from the present circumstances. The Nishnabotna decision does not directly address this agency's jurisdiction, other than to note that the Board cannot regulate a cooperative's rates. Moreover, footnote 2 of that decision clearly states that the Court's decision does not address a customer complaint of discrimination against one member by the other members of a cooperative. That is the gravamen of the Sweckers' complaint. Thus, Nishnabotna is irrelevant to this case.

Finally, Consumer Advocate responds to the argument that § 476.21 should be enforced in court by pointing out that § 476.3(1) authorizes the Board to investigate any complaint that a public utility is "in violation of any provision of law." This would include § 476.21.

Board analysis. The Board agrees with the proposed decision and order and the arguments of Consumer Advocate. Iowa Code § 476.1A provides that electric cooperatives are not subject to the Board's rate regulation, but it also provides that cooperatives are subject to § 476.21[1]. The Board is charged with the duty and the authority to enforce chapter 476, pursuant to §§ 476.2(1)[2] and 476.3[3]. Further, § 476.15 provides that the jurisdiction and powers of the Board shall extend to the utility business of public utilities operating within Iowa to the full extent permitted by the Constitution and laws of the United States, while § 476.51 authorizes the Board to assess civil penalties against any public utility for a violation of any "provision of

[1] Iowa Code § 476.1A provides, in relevant part, as follows:

> Electric public utilities … and electric cooperative corporations and associations are not subject to the rate regulation authority of the board. Such utilities are subject to all other regulation and enforcement of the board….
>
> * * *
>
> However, sections 476.20, 476.21, 476.41 through 476.44, 476.51, 476.56, 476.62, and 476.66 and chapters 476A and 478, to the extent applicable, apply to such electric utilities.

Iowa Code § 476.21 provides:

> A municipality, corporation or co-operative association providing electrical or gas service shall not consider the use of renewable energy sources by a customer as a basis for establishing discriminatory rates or charges for any service or commodity sold to the customer or discontinue services or subject the customer to any other prejudice or disadvantage based on the customer's use or intended use of renewable energy sources. As used in this section, "*renewable energy sources*" includes but is not limited to, solar heating, wind power and the conversion of urban and agricultural organic wastes into methane gas and liquid fuels.

[2] Providing, in relevant part, that "[t]he board shall have broad general powers to effect the purposes of this chapter…."

[3] Section 476.3 provides, in relevant part, that the Board has the authority to "determine the reasonableness … of anything done or omitted to be done by a public utility subject to this chapter in contravention of this chapter…."

this chapter…." There can be no serious argument that the Board lacks the authority to enforce § 476.21.

Moreover, the Board is clearly the right place for this complaint to be heard. While a district court judge would clearly be capable of understanding and deciding these rate discrimination issues, significant time and resources would be required to provide the court with the necessary background information and education to evaluate the technical matters. In contrast, the Board already has substantial expertise in these matters and employs a trained staff of engineers and accountants to advise and assist the Board in making these decisions. The Board believes the General Assembly intends that the Board should have jurisdiction over these complaints, as expressed in Iowa Code §§ 476.1A, 476.2(1), 476.3, 476.15, 476.21, and 476.51.

The Board affirms the proposed decision and order with respect to jurisdiction over § 476.21 complaints against electric cooperative associations.

**Issue 2: Did the administrative law judge err in finding the cogeneration tariff rates of Midland were discriminatory? (Raised by IAEC and CIPCO.)**

The proposed decision and order. The ALJ found that Midland's cogeneration tariff is unreasonably discriminatory, and therefore in violation of Iowa Code § 476.21, because it treats cogeneration customers differently only because they use a renewable source of energy and there is no evidence in the record to show that different treatment is appropriate. (PDO at 130.)

IAEC and CIPCO. IAEC and CIPCO argue the evidence shows Midland's cogeneration rates are cost-based and represent a reasonable effort to charge a fair rate. They also argue the cogeneration tariffs actually produce lower overall bills for both the Sweckers and Mr. Welch, so there can be no argument that the cogeneration rates are adversely discriminatory. Finally, they argue that permitting Mr. Welch the option of staying on Tariff 26.18 demonstrates that the cogeneration tariffs are potentially beneficial to at least some customers and therefore reasonable.

Sweckers. The Sweckers point out that Midland, IAEC, and CIPCO all admit that the cogeneration tariff and the regular three-phase service tariff treat customers differently; that is, that the tariffs discriminate based upon the customer's use of renewable energy. The Sweckers disagree with the companies' argument that the cogeneration tariffs are beneficial to customers and therefore reasonable. The Sweckers argue that any benefit they might realize from the cogeneration tariff is too small and uncertain to establish that the discrimination is reasonable.

Consumer Advocate. Consumer Advocate argues that Mr. Welch's experience, showing savings on the cogeneration tariff, is distinguishable from the Sweckers because Mr. Welch is a larger customer. Thus, his experience does not prove anything regarding the Sweckers' situation.

Board analysis. Prior to issuance of the proposed decision and order, the ALJ asked Board staff to estimate the Sweckers' total annual cost of electric service under Tariff 26.11 (the regular three-phase tariff) and Tariff 26.16 (the cogeneration tariff), using information in the record to estimate the output of the wind turbine and

other variables. These calculations were based on many assumptions and estimates, and the ALJ ultimately found the final calculations unpersuasive because of the uncertainty of the inputs. (PDO at 121.) However, the ALJ attached the staff calculations to the proposed decision as Attachment C.

Surprisingly, the staff calculations show the Sweckers would save approximately $370 per year under the cogeneration tariff, compared to the regular service tariff. This amounts to about 20 percent off their total annual billing, and would appear to support the cooperative's argument that the cogeneration tariffs are beneficial to cogeneration customers. However, this calculation is affected by the assumptions used. If the Sweckers' usage is less than projected or their coincident demand is higher, then the Sweckers could lose money on the cogeneration tariff. The Board finds the ALJ was correct to conclude that the overall estimate is too uncertain to be persuasive.

Moreover, the IAEC and CIPCO argument misses the point of the ALJ's finding of unreasonable discrimination. The ALJ did not find Tariff 26.16 unreasonably discriminatory because it would cost the customer more or less. The ALJ found the tariff discriminatory because it treats cogeneration customers differently just because they use alternative energy, without any neutral, reasonable justification. (Finding Of Fact Nos. 21-24, PDO at 139-140.) The net effect of that different treatment may be beneficial to some customers and adverse to others, but that is not the basis of the ALJ ruling. Iowa Code § 476.21 prohibits electric cooperatives from establishing discriminatory rates or charges based upon a

customer's use of renewable energy sources. Midland's cogeneration tariffs violate that prohibition.

The Board affirms the proposed decision and order on this issue. The Board further notes that this discussion is also relevant to the jurisdictional issue above, because it demonstrates the difference between rate regulation of a cooperative (which the Board does not have jurisdiction to do) and enforcement of the anti-discrimination requirement of § 476.21. The proposed decision and order does not tell Midland how to set these rates in the future; it only says Midland lacks justification for the existing tariff, which discriminates among customers based on their use of renewable energy sources. The first course of action would be prohibited, but the second is within the Board's authority.

**Issue 3: The proposed decision and order should have held that Midland and other non-rate-regulated utilities must provide net billing to their cogenerating customers. (Raised by the Sweckers.)**

The proposed decision and order. The Sweckers argued that they should be permitted to interconnect with Midland using a net billing arrangement. The ALJ found that the Board's rule 199 IAC 15.2(1)"c" specifically states that the net billing rule, 199 IAC 15.11(5), applies only to transactions between alternate energy providers and rate-regulated utilities. (PDO at 29-30.) Because Midland is not subject to rate regulation, the rule does not apply to Midland.

The Sweckers. On appeal, the Sweckers argue that net billing is not rate regulation and that exempting cooperatives from the net billing rule discriminates against cogenerator customers of cooperatives.

Midland, IAEC, and CIPCO. The cooperatives all argue that the rule clearly states that it applies only to utilities that are subject to rate regulation. Thus, they are not required to enter into net billing arrangements.

Consumer Advocate. Consumer Advocate states general agreement with the position of the Sweckers, but "[g]iven the status of net billing requirements as impacted by a pending judicial appeal in MidAmerican Energy Company v. Iowa Utilities Board, Iowa Supreme Court No. 99-1529, OCA did not appeal the Administrative Law Judge's resolution of the net billing issue in the present case."

Board analysis. The Board's rules on this issue are perfectly clear; the net billing rule applies only to rate-regulated utilities. The net billing rule is 199 IAC 15.11(5). Rule 15.2(1)"c" states that rule 15.11, among others, applies only to electric utilities that are subject to rate regulation by the Board. The Board will affirm the proposed decision and order with respect to this issue.

**Issue 4: The proposed decision and order requires the Sweckers to pay a portion of the cost of the special meter required for their service and did not specify how the cost of the special meter should be apportioned between the Sweckers and Midland. (Raised by the Sweckers.)**

Proposed decision and order. The ALJ found it is sometimes reasonable to treat a cogenerating customer differently from a regular three-phase customer because the cogenerator wants to sell to the utility, causing the utility to incur costs that other customers should not have to pay. (PDO at 132-33; Finding Of Fact No. 25, PDO at 140.) Some meter costs fall within this category. A regular three-phase meter will not measure power flows in both directions, as required if

the cogenerator is to sell his output, so it is reasonable to require the cogenerator to pay the extra cost of a special meter for that purpose. Similarly, in order to ensure its electric service meets Board service quality standards, Midland needs to measure the power quality of the wind generator. Again, this need is created by the cogenerator's desire to sell its excess output, so it is reasonable to require the cogenerator to pay the extra cost.

However, the ALJ found that measuring the cogenerator's coincident demand is for Midland's benefit, rather than the cogenerator's, to permit Midland to charge the customer on that basis. (Finding Of Fact No. 27, PDO at 141.) Coincident demand is not measured for regular three-phase customers, by Midland's choice. It would be unreasonable and discriminatory to make cogenerators pay more for a meter capability that serves only to let Midland charge them more.

Sweckers. If net billing were permitted, the Sweckers could use a standard three-phase meter and avoid all of these special meter costs, just like regular three-phase customers. Thus, requiring any additional payment for special metering is discriminatory. Further, they argue the proposed decision and order is not sufficiently clear with respect to the split of the special meter costs.

IAEC and CIPCO. Pursuant to Board rule, net billing is not required of cooperatives, so the first basis of the Sweckers' appeal is invalid. Further, the proposed decision and order adequately describes the factors to be considered in splitting the costs of special metering.

Board analysis. The proposed decision and order is consistent with the Board's earlier ruling in this docket regarding discrimination. Iowa Code § 476.21 appears to prohibit all discrimination against cooperative and municipal customers using renewable energy sources, but in the order assigning this case to the ALJ (issued June 23, 1999) the Board interpreted this to prohibit only *unreasonable* discrimination, since it may be perfectly reasonable, appropriate, and necessary to treat a cogenerating customer differently in some respects. The ALJ's decision finds that some meter costs (those required in order to permit sales from the customer to the utility) fall under the heading of costs that are appropriately borne by the customer. This is entirely consistent with the Board's earlier ruling.

The ALJ then divided the meter costs according to this principle of cost-causation. The only thing the ALJ did not do was assign specific dollar values to these costs; it appears the record does not contain sufficiently detailed information regarding meter costs to make specific apportionment possible. While the Sweckers argue that the order was insufficiently specific in this respect, there is little to be done when the necessary information in not available in the record. Moreover, there may not be a single correct answer to splitting the meter costs. Instead, it is likely the total meter costs could reasonably be allocated in a variety of ways. It seems possible the parties can negotiate the meter cost split, but if they cannot, they may return to the Board with a separate complaint and sufficient meter cost information to permit resolution of the issue.

The Board affirms the proposed decision and order with respect to the issue of meter cost allocation.

**Issue 5: The proposed decision and order allowed Midland to charge a 40 percent markup on the cost of the special meter, which Complainants believe to be discriminatory because regular three-phase customers are not charged for equipment related to their electrical service. (Raised by the Sweckers.)**

Proposed decision and order. Midland proposes to charge a 40 percent markup on the cost of the specialized meter. The ALJ found that Midland normally charges the same 40 percent on all materials purchased by its customers, to cover overhead expenses. So long as the same markup is charged to all customers, the ALJ found it is not discriminatory. (Finding Of Fact No. 29, PDO at 142.)

Sweckers. First, the Sweckers point out that they are not really "purchasing" the special meter, since title to the meter will stay with Midland. Moreover, they argue that "regular customers do not have to pay for any equipment related to service," so this charge is discriminatory.

IAEC, CIPCO, and Midland. IAEC and CIPCO assert that any attempt to review the level of Midland's markup would be prohibited ratemaking. Midland notes that 40 percent is the normal markup it applies to all materials (not merchandise) purchased by customers. (Tr. 713.)

Board analysis. First, it bears pointing out that all regular customers pay for the equipment used to provide their service; most customers pay the cost of the required meter as an unidentified part of their monthly bill (either in the

monthly service charge or in the cost of the first kilowatt-hours used). To the extent the rates ultimately charged to the Sweckers include any meter costs, those payments should be credited against any meter costs the Sweckers are required to pay under the Board's resolution of the special meter cost issue, above. Thus, the Sweckers are not being required to pay a category of costs that other customers do not pay; the only difference is that the meter costs will be separately identified for the Sweckers.

The second part of this issue concerns the amount of the markup. This issue is another example of the difference between rate regulation of a cooperative (which the Board may not do) and enforcement of the anti-discrimination provisions of § 476.21 (which is within the Board's authority). The Board cannot review the reasonableness of the 40 percent markup itself, and the ALJ did not do so. However, the Board (and the ALJ) *can* examine the facts to determine whether Midland applies the markup in a discriminatory manner that violates § 476.21. If, for example, Midland charged a 40 percent markup to most customers, but a 150 percent markup to customers who use renewable energy sources, the Board might find that difference to be unreasonable discrimination (assuming there was no valid justification for the difference). This is exactly the type of review the ALJ conducted, and the ALJ concluded that Midland is treating all customers the same in this respect, so there is no discrimination. The Board agrees and will affirm the proposed decision and order on this issue.

**Issue 6: The proposed decision did not require Midland to purchase energy and capacity from cogenerators at avoided cost, as**

**required by 18 C.F.R. §§ 292.303 and 292.304. (Raised by the Sweckers.)**

Proposed decision and order. The ALJ concluded that the issue of how much Midland should pay to the Sweckers for their net generation is a matter of federal law, over which the Board has no jurisdiction, citing 16 USC § 824a-3(b) and 18 CFR § 292.304. (Conclusion of Law No. 1, PDO at 142.)

The Sweckers. The Sweckers claim that the ALJ failed to address this issue and ask the Board to clarify the matter in its final decision.

IAEC, CIPCO, and Midland. The proposed decision and order correctly determined that the purchase price to be paid to the Sweckers is not a question within the Board's jurisdiction.

Board analysis. Federal law requires that an electric cooperative purchase the output of a qualifying facility at a price based upon the cooperative's full-avoided cost. Determining that cost is a matter of federal jurisdiction. The Board affirms the proposed decision and order with respect to this issue.

**Issue 7: Whether the order amending the proposed decision and order correctly addressed the Sweckers' rights and remedies to avoid disconnection pursuant to 199 IAC 20.4(16)"c" and 199 IAC 20.4(15)"h"(6). (Raised by the Sweckers.)**

Proposed decision and order and order amending proposed decision and order. In the proposed decision and order, the ALJ originally found that the record lacked any evidence that Midland sent a required 12-day notice to the Sweckers before disconnecting their regular household service for nonpayment.

The ALJ therefore found the disconnection unlawful and prohibited Midland from charging reconnection fees of $78.75 and an after-hours trip charge of $215.25. (Conclusion of Law No. 19, PDO at 147.)

After reopening the record for additional evidence, the ALJ found that Midland complied with all of the notice requirements of the Board's rules and Midland's tariff in disconnecting the Sweckers. Conclusion of Law No. 19 was therefore amended to permit Midland to charge the reconnection fee and trip charge to the Sweckers.

When the record was reopened, the Sweckers also argued that Midland had violated 199 IAC 20.4(15)"h"(6), providing that when a customer disputes a portion of a bill, the customer may pay the undisputed portion in order to avoid disconnection for nonpayment. The ALJ found that the rule did not apply to this situation, since the Sweckers were not disputing the accuracy of the past-due bill, but were instead combining two unrelated matters (their household service and their desire for three-phase service).

The Sweckers. In their amended notice of appeal, the Sweckers argue that 199 IAC 20.4(15)"h"(6) gives them the right to pay the undisputed portion of their bill and avoid disconnection. In this instance, they offered Midland a total payment in excess of the overdue balance (the overdue amount plus $2,500 for a three-phase connection). They argue Midland chose to reject their payment because they were proposing to use renewable energy sources and that Midland therefore violated § 476.21.

On August 14, 2000, the Sweckers filed an additional pleading, arguing that the ALJ's "Order Granting Motion To Reopen Hearing And Denying Motion Regarding Twelve-Day Notice" (issued April 26, 2000) caused the Sweckers to believe that the original resolution fo the disconnection issue would not be changed as a result of reopening the record. The Sweckers ask the Board to uphold the original ruling of the PDO that the disconnection was unlawful.

Midland. The Sweckers were disconnected because they had not paid their overdue bills, not because they had a wind generator. If the overdue bill had been paid, they would not have been disconnected. Therefore, the disconnection was not motivated by the Sweckers' use of renewable energy sources.

Midland also argues that the Sweckers were never disputing the overdue bill amount, so the provisions of the rule were never applicable.

IAEC and CIPCO. The dispute between the Sweckers and Midland was about the proper tariff to apply to the Sweckers' three-phase connection, not about overdue bills for regular single-phase service. The Sweckers should not be permitted to confuse the issues.

Board analysis. Upon reopening of the record, this issue seems to have split into two sub-issues. The first concerns the adequacy of Midland's disconnection notification. The ALJ's amended finding is that Midland gave all of the required notices to the Sweckers before disconnecting them. Mrs. Swecker and the Midland witness disagree about whether at least one telephone call was attempted, but Midland memorialized the call in a contemporaneous letter, which

the Sweckers did not dispute at the time. The ALJ found this to be persuasive evidence that the telephone call was attempted, which is consistent with the requirement of 199 IAC 20.4(15)"h."[4] The Sweckers have not offered any persuasive evidence to justify changing the ALJ's finding on this issue, and the Board affirms that finding.

The Board will also address the Sweckers' August 14, 2000, pleading at this time, even though the time for the other parties to respond to it has not yet expired. The Sweckers appear to confuse two rulings in the ALJ's April 26, 2000, order reopening the record. The ALJ was ruling on a motion filed by Midland, CIPCO, and the IAEC asking that the ALJ either (a) reopen the record for additional evidence regarding the disconnection notice or, (b) in the alternative, find that the disconnection notice was not an issue before the ALJ. The ALJ granted the motion to reopen the record but denied the request for a finding that the notice issue was not properly before the ALJ.

The Sweckers appear to confuse these two rulings in their August 14, 2000, pleading, when they argue as follows:

> By denying the joint motion the ALJ led the complainants and others to believe that the outcome of the unlawful disconnection was not going to be at issue or that the ALJ was not going to rescind her previous ruling. Complainants were led to believe based on the ALJ's order that the record was reopened for the (limited purpose only) of accepting additional evidence.

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[4] 199 IAC 20.4(15)"h" provides, in relevant part, that an electric utility may disconnect a customer for nonpayment of a bill only if … "(5) When disconnecting service to a resident, ***made a diligent attempt*** to contact, by telephone or in person, the customer responsible for payment for service to the residence to inform the customer of the pending disconnection and the rights and remedies…." (Emphasis added.)

(August 14, 2000, pleading at p. 2.) As described above, this is not what the ALJ ruled, and it would be unreasonable for anyone to believe that the ALJ would reopen a record to receive additional evidence if the ALJ had already decided that the final outcome would not be changed, regardless of the evidence offered. The only motion the ALJ denied was the claim that the ALJ never properly had the issue before her; in no way can this be construed as a ruling that additional evidence should be received but the outcome would never be changed. The Board will deny the Sweckers' request that it uphold their interpretation of the ALJ's April 26, 2000, order.

The second issue concerns the claim that the Sweckers offered partial payment of a disputed bill and therefore should not have been disconnected, pursuant to 199 IAC 20.4(15)"h"(6). In order to make this claim, the Sweckers have to combine their dispute regarding their cogeneration interconnection with their decision to withhold payment for their regular utility service. This seems to be the exact opposite of the result the rule was intended to produce. The rule is intended to permit customers to dispute one issue without dragging their entire bill into the matter; Sweckers are trying to use it to combine the original issue (the cogeneration tariff) with other, undisputed matters (their regular household service). The ALJ found that the issues of three-phase interconnection and payment for single-phase service were separate issues, such that the rule did not apply. The Board agrees and will affirm the proposed decision and order, as modified by the "Order Amending Proposed Decision And Order" issued May 18, 2000, on this issue.

**Issue 8: Whether Iowa electric cooperative associations are subject to the requirements of Iowa Code §§ 476.41-.45 and, therefore, subject to the Board's rules implementing or adopted pursuant to those statutes, including the Board's net billing rule. (Raised by Consumer Advocate.)**

Proposed decision and order. In their original complaint, the Sweckers asked that the Board set the rates Midland should pay to the Sweckers for their excess generation. The Sweckers based their request on Iowa Code § 476.1A, which provides that Iowa Code §§ 476.41-.45 apply to electric cooperatives. Those sections, and specifically § 476.43, purport to give the Board authority to set the rates at which public utilities must purchase the output of alternative energy producers, such as a wind turbine.

On September 9, 2000, the ALJ issued an order ruling that §§ 476.41-.45 apply only to rate-regulated utilities. Since Midland is not a rate-regulated utility, § 476.43 could not be used as the basis for setting purchase rates for Midland. On the same date, the ALJ also ruled that the Board's AEP net billing rate applies only to transactions between AEPs and rate-regulated utilities, an issue discussed above.

The ALJ made these rulings based upon an Iowa Supreme Court decision, Iowa Power and Light Company v. Iowa State Commerce Comm'n, 410 N.W.2d 236 (Iowa 1987), and the underlying district court decision, Iowa Power and Light Company, et al., v. Iowa State Commerce Comm'n, Polk County Nos. AA 677 and AA 790 (1986). The district court found that federal law preempted Iowa Code §§ 476.41-.45 as they applied to cooperatives and other utilities that

are not subject to state rate regulation. The Supreme Court did not expressly discuss this ruling of the district court, but the Board's ALJ found the general affirmation of the district court order indicative of approval.

Consumer Advocate. Consumer Advocate argues that Iowa Code § 476.1A clearly states that §§ 476.41-.45 apply to cooperatives. Consumer Advocate argues that the Iowa Supreme Court may affirm a district court ruling on any ground, so it is not clear that the Supreme Court adopted the broad holding of the district court on this particular issue. Consumer Advocate notes that the legislature has not amended § 476.1A to reflect the ALJ's interpretation of the Iowa Power decisions; Consumer Advocate considers this as additional evidence that the legislature does not share the ALJ's interpretation.

Moreover, Consumer Advocate argues that the Iowa Supreme Court only held that Congress preempted the states in those areas where the states were not already regulating; because Iowa has a statute purporting to regulate transactions between AEPs and cooperatives, Congress did not intend to preempt.

Consumer Advocate also notes that § 476.43(4) can only apply to cooperatives and similar utilities, such that a ruling that the statute is preempted would make the statute meaningless. Section 476.43(4) relates to setting rates for purchases from AEPs and provides:

> In the case of a utility that purchases all or substantially all of its electricity requirements, the rates established under this section must be based on the electric utility's current purchased power costs.

Because cooperatives and municipals are the only utilities that purchase substantially all of their electricity requirements, the statute has no meaning if it does not apply to such utilities.

Finally, Consumer Advocate argues that once it is determined that Iowa Code §§ 476.41-.45 apply to cooperatives, then the Board's rules adopted pursuant to those sections should also apply. This would include the Board's net billing rule.

IAEC and CIPCO. IAEC and CIPCO agree that the language of the relevant statutes is unclear, but they disagree with Consumer Advocate's interpretation of those statutes. They argue that § 476.1A provides that §§ 476.41-.45 apply to cooperatives only "to the extent applicable," and that it is "likely" that the legislature intended only the definitions and general policy provisions of §§ 476.41-.45 to apply to cooperatives, but not the rate-setting provisions. This does not render § 476.43(4) meaningless, as argued by Consumer Advocate, because cooperatives can always elect to become subject to the Board's rate regulation, as Linn County REC has elected to do.

IAEC and CIPCO also argue that, even if the legislature did intend for all of §§ 476.41-.45 to apply to cooperatives, the Polk County District Court clearly held that those statutes were preempted by federal law and the Iowa Supreme Court affirmed that ruling. In other words, IAEC and CIPCO agree with the ALJ's reasoning on this point.

Finally, on the net billing issue, IAEC and CIPCO point out that the net billing rule was recently found to be preempted by federal law in MidAmerican

Energy Company v. Iowa Utilities Board, et al., Polk County Nos. AA 3173, AA 3195, and AA 3196 (issued August 24, 1999). In that decision, the district court found the net billing rule is preempted by PURPA (the Public Utilities Regulatory Policies Act of 1978, 16 USC § 824 et seq.). For the reasons stated in that decision, the Board lacks jurisdiction to impose net billing upon Midland or any other utility, according to IAEC and CIPCO.

Board analysis. The Board agrees with the September 9, 1999, ruling of the ALJ, finding that the Supreme Court and district court decisions in the Iowa Power cases should be read together to find that federal law preempts the application of §§ 476.41-.45 to utilities that are not subject to rate regulation, such as cooperatives. The Iowa Supreme Court's ruling on this point is not as clear as one might like, but the fact remains that the Polk County district court ruled that application of these statutes to electric cooperatives (that are not subject to rate regulation) is preempted by federal law and no higher court has overturned that ruling.

Consumer Advocate's argument that this renders § 476.43(4) a nullity seems to miss the point. Clearly, the Iowa legislature intended for this subsection to have effect, but the district court ruled that the statute is preempted by federal law, at least with respect to cooperatives that are not subject to rate regulation by the state. It should come as no surprise to anyone that a statute that has been preempted is rendered a nullity.

Finally, once §§ 476.41-.45 are preempted with respect to cooperatives that are not subject to the Board's rate regulation, then the Board's net billing rule

clearly does not apply and there is no need to address the more recent district court ruling on this issue.

The Board affirms the proposed decision and order on this issue.

## ORDERING CLAUSES

**IT IS THEREFORE ORDERED:**

1. The proposed decision and order issued by the Board's administrative law judge on March 28, 2000, as modified by the order amending the proposed decision and order issued May 18, 2000, is affirmed as to all appeals.

2. Any motions, arguments, or other pleadings that have not been expressly ruled upon by the Board are hereby denied as lacking sufficient merit to warrant further discussion.

**UTILITIES BOARD**

/s/ Allan T. Thoms

/s/ Susan J. Frye

ATTEST:

/s/ Raymond K. Vawter, Jr.
Executive Secretary

/s/ Diane Munns

Dated at Des Moines, Iowa, this 25th day of August, 2000.